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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHRISTOPHER LEE SELTER, as Successor
Trustee, etc.,

Plaintiff and Appellant,

v.

FRED GLEDHILL,

Defendant and Respondent.

D073372

(Super. Ct. No. 37-2017-00015333-
CU-FR-CTL)

APPEAL from an order and judgment of the Superior Court of San Diego County,
Eddie C. Sturgeon, Judge. Affirmed.

Benice Law and Jeffrey S. Benice for Plaintiff and Appellant.

Daley & Heft, Lee H. Roistacher and Matthew E. Bennett for Defendant and
Respondent.

Beverly Wilson Gledhill (Beverly) appeals from an order and judgment dismissing
her complaint against Fred Gledhill (Fred) under the anti-SLAPP statute, Code of Civil

Procedure¹ section 425.16.² Appellant contends the trial court erred in granting Fred's anti-SLAPP motion because (1) Beverly's claims do not arise from protected activity and (2) even if they did, appellant demonstrated a probability of success on the merits. We affirm because Beverly's causes of action arise out of protected activity—the settlement of a prior lawsuit between the parties—and her claims are barred by the litigation privilege.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Note Action

Fred and Beverly were married to each other for about a year in the 1980's. In the late 1980's, Fred sold certain real property to Beverly (the Property) in exchange for a promissory note requiring Beverly to pay Fred \$224,000 (the Note) plus interest, with final payment due in April 2018.

In September 2011, Fred sued Beverly for defaulting on the Note (the Note action), alleging that she owed \$213,454.62. In June 2013, while represented by separate counsel, Fred and Beverly settled the Note action. Beverly (then-82 years old) (a) stipulated to entry of a \$250,000 judgment against her, secured by a trust deed on the Property; and (b) agreed that Fred's sister, Marilyn, could reside on the Property rent-free for the rest of Marilyn's life. In exchange, Fred agreed (1) that the judgment would not

¹ Undesignated statutory references are to the Code of Civil Procedure.

² Beverly died on December 9, 2017, after the filing of the notice of appeal. We have granted appellant's unopposed motion to substitute Christopher Lee Selter (Selter), successor trustee of the Gledhill-Selter Trust dated May 11, 1998, in her place.

accrue interest until 60 days after Marilyn's death, and (2) to not enforce the judgment until 12 months after the last to die of Beverly or Marilyn.

When reciting the material terms of the settlement on the record, Beverly's attorney, Ronald Noya, and the trial judge questioned Beverly as follows:

"Mr. Noya: Do you understand that you are resolving your difference with [Fred] in the two cases that have been filed by agreeing to allow a judgment to be entered to his favor and against you in the sum of \$250,000?

"[Beverly]: I do.

"The Court: And do you know that you're going to allow a trust deed to be impressed upon [the Property] in favor of [Fred] or his Trust or his designee in the sum of \$250,000?

"[Beverly]: I do.

"Mr. Noya: And do you know what a trust deed is?

"[Beverly]: I do.

"Mr. Noya: So you're securing this judgment by giving him a trust deed on your property; correct?

"[Beverly]: Yes.

"The Court: And [Marilyn] has been living there your [*sic*] quite some time, as you know, correct?

"[Beverly]: Yes.

"Mr. Noya: And you're going to allow her to continue to live there rent free until she dies, do you understand that?

"[Beverly]: Yes.

"Mr. Noya: And this document that is being—that you're agreeing to, you understand is not going to bear any interest until such time as Marilyn dies? Do you understand that?

"[Beverly]: Yes.

"Mr. Noya: Are you sure?

"[Beverly]: I'm sure.

"Mr. Noya: Okay. And that once Marilyn dies, the interest on the \$250,000 judgment will begin to accrue five per *[sic]* interest on that judgment. Do you understand that?

"[Beverly]: Yes.

"Mr. Noya: And there will be a point in time, I'm sorry to say, when we all die; Marilyn is going to die and you're going *[t]*o die. Whoever is the last to die will trigger the date by which enforcement proceedings will begin within 12 months of that date of death. Do you understand that?

"[Beverly]: Yes.

"Mr. Noya: So, basically, after the latest person to die, you or Marilyn, there will be a 12-month window where no enforcement proceedings will take place—'enforcement proceedings' meaning efforts to collect on the \$250,000 plus any interest that has accrued—nothing will happen, but on the 12th month after that death, *[Fred]*, the Trust, or his designee can undertake whatever actions the law allows to try and enforce that judgment and collect all of their money? You get that?

"[Beverly]: Yes, I do.

"Mr. Noya: And do you agree with all of these terms?

"[Beverly]: I do."

The court stated, "I think that this is a good settlement and I want to commend both of you for giving a little and resolving it the way that you have done. You have done it in a very appropriate way and I commend both of you."

B. Beverly Sues Fred

About three years later, Beverly sued Fred in the instant case to rescind the settlement and for damages. Beverly alleged that Fred deceived her into settling the Note action, despite knowing that she had not only fully repaid the Note, but overpaid by about \$96,000. Beverly alleged that her signature on the settlement agreement was a "copy-and-paste job from another document," and her signature on the trust deed securing the stipulated judgment was forged. Beverly alleged nine causes of action: (1) elder financial abuse, (2) intentional misrepresentation, (3) negligent misrepresentation, (4) rescission of the settlement agreement and stipulation for entry of judgment, (5) rescission of the stipulated judgment, (7) unjust enrichment, (8) declaratory relief, and (9) imposition of a constructive trust.

C. Anti-SLAPP Motion

Fred filed an anti-SLAPP motion, asserting that Beverly's claims arose out of protected activity—i.e., the Note action—and were barred by the litigation privilege.³

Fred supported his motion with a declaration from Mr. Noya, who stated that Beverly signed the settlement agreement in his presence and that her signature on the trust deed had been notarized. Fred filed a declaration stating he had seen Beverly's

³ Alternatively, Fred also asserted that (1) Beverly's causes of action for fraud, unjust enrichment, and constructive trust were time-barred; (2) absent showing a "grand conspiracy between Fred, Fred's attorney, Beverly's attorney, and the court," there could be no financial elder abuse; (3) the rescission causes of action failed on their merits; and (4) a judgment cannot be rescinded. Because we resolve this case on litigation privilege grounds, it is unnecessary to consider these other theories.

signature "countless times," and her signature on the settlement agreement and deed of trust were authentic.

D. Opposition to Anti-SLAPP Motion

Beverly's attorneys opposed the anti-SLAPP motion, asserting that (1) Beverly's claims are " 'merely incidental' or 'collateral' " to the Note action, and (2) the illegal activity (forgery) she alleged is not protected by the anti-SLAPP statute.⁴ Selter filed a declaration stating that he is Beverly's attorney-in-fact under a durable power of attorney. He attached to his declaration financial records that he asserted showed Beverly paid the Note in full by January 2011. He stated that when Beverly settled the Note action she "suffered from a host of medical conditions which impacted her memory and cognitive function." Selter asserted that as a result, Beverly "had not remembered that she had fully satisfied her payment obligations to Fred" when settling the Note action. Selter declared that Beverly's signature on the settlement agreement and stipulation for entry of judgment were forged.⁵

E. Ruling

After conducting a hearing, the court granted Fred's anti-SLAPP motion. The court ruled that Beverly's complaint arises from the Note action, which is protected activity under section 425.16, subdivision (e)(2). The court also determined that Beverly failed to establish a probability that she would prevail on her claims.

⁴ Beverly's opposition did not address the litigation privilege.

⁵ Beverly's attorneys did not submit a declaration from Beverly.

DISCUSSION

I. *THE COURT CORRECTLY GRANTED THE ANTI-SLAPP MOTION*

A. *No Forfeiture*

In the respondent's brief, Fred contends that appellant forfeited his appellate contentions by failing to include the order granting the anti-SLAPP motion in the appellant's appendix, failing to designate a reporter's transcript from that hearing, and by including in the appendix illegible copies of the evidence Beverly filed in the trial court.

Appellant did not file a reply brief and, therefore, has not responded. Nor has he sought to augment the record. It is appellant's obligation to submit an adequate record to demonstrate error and because he did not include the order being appealed, we could dismiss the appeal on that ground alone. (*Altman v. Poole* (1957) 151 Cal.App.2d 589, 593.)

However, in the interests of addressing the merits and avoiding the possibility of further derivative litigation, we augmented the record on our own motion to include the order granting the anti-SLAPP motion.

Moreover, contrary to Fred's assertion, a reporter's transcript is not essential for de novo review of an order granting an anti-SLAPP motion. (*Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699-700.) Additionally, as explained *post*, it is not necessary to review the illegible documents in appellant's appendix because the action is barred by the litigation privilege, regardless of their contents. With no procedural impediment remaining, we turn to the merits.

B. *General Anti-SLAPP Principles and the Standard of Review*

" 'A SLAPP [strategic lawsuit against public participation] is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. " 'While SLAPP suits masquerade as ordinary lawsuits . . . , they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.' " ' " (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 585 (*Okorie*).) "To combat [such] lawsuits . . . the Legislature has authorized a special motion to strike claims that are based on a defendant's engagement in such protected activity." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*).)

Section 425.16 provides that a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id.*, subd. (b)(1).)

As used in the statutory scheme, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any written or oral statement or writing made in connection with an

issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" (§ 425.16, subd. (e)(1), (2).)

In determining whether a cause of action arises from protected activity, " [t]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of [section 425.16]. ' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' " (*Park, supra*, 2 Cal.5th at p. 1063.) Thus, "a claim may be struck only if the speech of petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id.* at p. 1060.)

In ruling on an anti-SLAPP motion, the court engages in a two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) This second step is described as a " 'summary-judgment-like procedure.' " (*Ibid.*) Only a claim that satisfies both prongs—i.e., that arises from protected activity and lacks even minimal merit—will be stricken under section 425.16. (*Okorie, supra*, 14 Cal.App.5th at p. 591.)

We review a trial court's decision on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) Because we review the correctness of the order and not the court's reasons, we will affirm if the order is correct on any theory

properly before the trial court. (See *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1307.)

C. Prong One Analysis

1. Beverly's first cause of action

Beverly's first cause of action is for "elder financial abuse." The alleged injury-producing conduct consists entirely of Fred's litigation of the Note action. For example, paragraph No. 15 states that Fred initiated the Note action "alleging that a balance in the amount of \$213,347.62 is owed . . . even though [Fred] had been fully repaid" Paragraph No. 16 alleges Beverly entered into the settlement agreement and stipulated judgment. Paragraph No. 18 alleges her signature on the settlement agreement was forged, and paragraph No. 22 alleges the trust deed is similarly forged. In paragraph No. 31, Beverly alleges that she incurred a "false financial obligation" by entering into the settlement agreement and stipulation for entry of judgment.

This cause of action arises from protected activity. " 'A cause of action 'arising from' defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.' " (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).)

" ' "[A]ll communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding . . . are per se protected as petitioning activity by the anti-SLAPP statute.' " (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 113 (*Optional Capital*).) "Consequently, because settlement negotiations are regarded as an exercise of the right to petition, communications during such negotiations are regarded as having been made in connection with the underlying

lawsuit for purposes of section 425.16, subdivision (e)(2)." (*Id.* at p. 114; see also *Park*, *supra*, 2 Cal.5th at p. 1060.)

2. *Second and third cause of action*

Beverly's second cause of action is for "Intentional Misrepresentation." After incorporating the previous allegations by reference, she alleges that Fred's representations that Beverly owed money on the Note was false because "not only had [Beverly] completely paid her payment obligation[s] to [Fred], she had overpaid them by approximately \$96,659."

Beverly's third cause of action for negligent misrepresentation is essentially the same, but instead of alleging intentional misrepresentation, alleges that Fred had "no reasonable grounds for believing the representation was true"

These causes of action arise from protected activity. Fraudulent statements made during litigation, including during settlement negotiations, are protected activity under the anti-SLAPP statute. (*Optional Capital*, *supra*, 18 Cal.App.5th at p. 114.) For example, in *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834 (*Navarro*), the plaintiff alleged that the defendant made fraudulent promises to induce plaintiff's consent to a stipulated judgment in an earlier action. The appellate court held that allegedly fraudulent statements within the context of negotiating a stipulated judgment were within the scope of section 425.16. (*Navarro*, at p. 842.)

Similarly, in *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, the appellant negotiated a settlement of an action and subsequently was sued in a case alleging causes of action for fraud based on his participation in negotiations that resulted in that

settlement. (*Id.* at p. 959.) The Court of Appeal held the settlement negotiations were protected activity warranting a dismissal under the anti-SLAPP statute. (*Seltzer*, at pp. 964, 969.)

More recently, in *Suarez v. Trigg Laboratories, Inc.* (2016) 3 Cal.App.5th 118 (*Suarez*), after an underlying case was settled the plaintiff sued to rescind the settlement, alleging the defendant concealed certain information to induce settlement. The court affirmed the grant of an anti-SLAPP motion stating, "Misrepresentation or failure to disclose can be protected petitioning activity for purposes of section 425.16." (*Id.* at p. 124.)

3. *Fourth, fifth, and sixth causes of action*

Beverly's fourth cause of action seeks rescission of the settlement agreement and stipulation for entry of judgment based on mistake, duress, fraud, undue influence, and lack of consideration. In addition to incorporating previous allegations by reference, Beverly alleges that "[d]espite the debt being completely repaid, [Fred] initiated the [u]nderlying [c]ase" and "represented to [Beverly] there were amounts owing to [Fred] pursuant to the [Note]." She again alleges that her signature on the settlement agreement is a "forgery" and that "[a]s a proximate result of [Fred's] material misrepresentations and otherwise wrongful conduct, [she] seeks an order and judgment rescinding and void[ing] the settlement agreement and stipulation for entry of judgment"

Beverly's fifth cause of action is essentially identical to the fourth, but is directed at rescinding the stipulated judgment. Her sixth cause of action seeks rescission of the trust deed on the same grounds.

These causes of action arise from protected activity because the alleged injury-producing conduct is the Note action and settlement of same. (*Optional Capital, supra*, 18 Cal.App.5th at p. 114; *Suarez, supra*, 3 Cal.App.5th at p. 123.)

4. *Seventh, eighth and ninth causes of action*

In a seventh cause of action entitled "Unjust Enrichment," Beverly incorporates by reference the previous allegations. She seeks to recover funds taken from her "by means of deceptive and fraudulent practices"

However, "there is no cause of action in California for unjust enrichment. 'The phrase "Unjust Enrichment" does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.' " (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.)

In any event, the seventh cause of action stands on the same footing as the others—it arises from protected activity because Beverly alleges the "deceptive and fraudulent" litigation and settlement as the actionable wrong.

In her eighth and ninth causes of action, Beverly seeks declaratory relief and imposition of a constructive trust "because [Fred] . . . obtained . . . [Beverly's] monies and obtained [an] interest[] in [the Property] by the wrongful conduct" previously alleged. These causes of action allege nothing new and arise from protected activity because they are based on Fred's conduct in commencing and later settling the Note action.

5. *Summary*

Beverly's causes of action arise from protected activity because the alleged injury-producing conduct is Fred's filing the Note action, his conduct in litigating that case,

including representations made about Beverly owing him money, the settlement agreement, stipulation, judgment, and trust deed recorded to secure the stipulated judgment. Litigating and settling the Note action is not merely evidence of liability, nor is such conduct merely a step leading to some different act for which liability is asserted. (See *Park, supra*, 2 Cal.5th at p. 1060 ["a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted"].) Thus, the trial court correctly determined that the complaint arises from protected activity.

D. *Beverly's Contentions*

1. *Incidental and collateral*

Appellant contends that the causes of action do not arise out of protected activity because Fred's litigation conduct is " 'merely incidental' or 'collateral' " to these claims. (Italics omitted.) In some instances, speech and petitioning activity is peripheral to the actual claim in a complaint. (See, e.g., *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 794, 809 [overall thrust of complaint attacked alleged business misdeeds rather than "collateral activity of pursuing government approvals"].) However, that is not the case here. A fair reading of the complaint shows that Fred's litigation conduct is not incidental or collateral, but rather is the core of Beverly's causes of action. Paragraph No. 31, incorporated by reference into the other causes of action, aptly summarizes the gravamen of Beverly's case, alleging that "by virtue of entering into the purported settlement agreement and stipulation for entry of judgment . . . and [s]tipulated [j]udgment . . . [, Fred] created a false financial obligation in the form of a

judgment against [Beverly]" Indeed, elsewhere in his brief, appellant candidly concedes that the causes of action "arose from [Fred's] . . . civil action against [Beverly] alleging that [she] owed him \$213,347.62."

2. *Illegality*

Citing *Flatley, supra*, 39 Cal.4th 299, appellant contends section 425.16 does not apply to "illegal" conduct. Pointing to allegations that Beverly's signature is forged on the settlement agreement and deed of trust, appellant asserts the court erred in determining the complaint arises from protected activity.

Section 425.16 "cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley, supra*, 39 Cal.4th at p. 317.) However, the Court in *Flatley* stated this rule only applies where "either the defendant concedes, or the evidence conclusively establishes that the assertedly protected speech or petition activity was illegal as a matter of law" (*Id.* at p. 320.) Fred denies making any false statements and denies that Beverly's signature was forged. Mr. Noya declared that Beverly signed settlement documents in his presence. Beverly submitted no evidence that conclusively establishes the alleged forgery. Consequently, the *Flatley* illegality exception does not apply. (See *Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 854.)

Having determined that Beverly's causes of action arise from protected activity, we now consider whether the trial court correctly concluded that her case lacks even minimal merit.

E. *Prong Two Analysis*

1. *The litigation privilege, in general*

In an anti-SLAPP motion, " ' "A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes a defendant's liability on the claims." ' " (*Optional Capital, supra*, 18 Cal.App.5th at p. 115.) Under Civil Code section 47, subdivision (b), the litigation privilege " 'applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' " (*Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 23-24 (*Home Ins.*).

2. *Policy reasons for the litigation privilege*

" 'The principal purpose of [the litigation privilege] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.' " (*Home Ins., supra*, 96 Cal.App.4th at p. 23.) Moreover, " 'in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the . . . falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result.' " (*Ibid.*) " 'To allow a litigant to attack the integrity of evidence after the proceedings have concluded, except in the most narrowly circumscribed situations such as extrinsic fraud, would impermissibly burden, if not inundate, our justice system.' " (*Rusheen, supra*, 37 Cal.4th at p. 1064.)

3. *The privilege applies to fraudulent misrepresentations that induce settlement*

The litigation privilege applies to statements made during settlement negotiations, and thus bars fraud actions based on a party's statements made during settlement negotiations. (*Flatley, supra*, 39 Cal.4th at p. 325; *Home Ins., supra*, 96 Cal.App.4th at p. 24 [the litigation privilege bars actions for fraudulently inducing a settlement agreement]; *Navarro, supra*, 134 Cal.App.4th at p. 843.)

4. *The privilege applies to forged documents presented in litigation*

The litigation privilege even applies to forgery and falsification of documents presented in litigation. For example, in *Steiner v. Eikerling* (1986) 181 Cal.App.3d 639 (*Steiner*), a California resident died while visiting relatives in Germany. His German relatives kept his death a secret and moved into his home, obtaining samples of his handwriting. (*Id.* at p. 640.) They forged a handwritten will, naming themselves as beneficiaries and offered the will for probate. (*Ibid.*) After the decedent's relatives in California successfully contested the will, they sued the German relatives, alleging civil conspiracy and malicious institution of civil proceedings. (*Id.* at p. 641.) The trial court properly struck the civil conspiracy claim because presenting a forged will for probate was privileged under the litigation privilege. (*Id.* at p. 643.) The court noted that this privilege " "is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say." " ⁶ (*Id.* at p. 643.)

⁶ The *Steiner* court also held that the cause of action for malicious prosecution of a civil proceeding survived because the litigation privilege does not immunize malicious prosecution. (*Steiner, supra*, 181 Cal.App.3d at pp. 643, 645.) This aspect of *Steiner* is

"Preparing and presenting false documents is equivalent to the preparation and presentation of false testimony. Since there is no exception to the privilege when the testimony is perjured, by a parity of reasoning no exception should apply to the preparation and presentation of false documentary evidence." (*Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 489 (*Pettitt*).)

5. *Beverly's causes of action are barred by the litigation privilege*

The gravamen of Beverly's complaint is that Fred sued her, deceived her into settling a debt she had already fully paid and, to effectuate that settlement, forged her signature on a stipulation for entry of judgment and a trust deed to secure that judgment. Beverly's causes of action are barred by the litigation privilege because each is based on alleged communications (1) made in judicial proceedings; (2) by a litigant; (3) to achieve the objects of the litigation; and (4) have a connection and logical relation to the action. (*Home Ins., supra*, 96 Cal.App.4th at pp. 23-24.) The overarching public policy dictating this result is one that places on parties the obligation to ferret out the truth *during* the underlying litigation, not in derivative litigation afterwards. "While we by no means condone intentionally deceptive conduct before the courts, the litigation privilege is

inapplicable here, however, because Beverly did not plead a cause of action for malicious prosecution, nor could she. (See *Ferreria v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409, 413 [settlement is not a favorable termination of prior action].)

absolute." (*Herterich v. Peltner* (2018) 20 Cal.App.5th 1132, 1142; see also *Pettitt*, *supra*, 28 Cal.App.3d at p. 492.)⁷

6. *No allegations of extrinsic fraud or extrinsic mistake*

Appellant contends the litigation privilege does not apply because the alleged wrongful conduct constitutes "extrinsic fraud" and/or because of Beverly's "extrinsic mistake." The litigation privilege "does not apply to an equitable action to set aside a settlement agreement for extrinsic fraud." (*Home Ins.*, *supra*, 96 Cal.App.4th at p. 26.) However, appellant's argument fails because the complaint does not allege extrinsic fraud. " 'Fraud is extrinsic where the defrauded party was deprived of the opportunity to present his or her claim or defense to the court, that is, where he or she was kept in ignorance or in some other manner, other than from his or her own conduct, fraudulently prevented from fully participating in the proceeding.' " (*Id.* at pp. 26-27.) Examples of extrinsic fraud include "concealment of the existence of a community property asset, failure to give notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed (and then it does proceed)." (*Navarro*, *supra*, 134 Cal.App.4th at p. 844.)

In contrast, fraud or mistake is " 'intrinsic if a party has been given notice of the action and has not been prevented from participating therein, that is, if he or she had the

⁷ Because Beverly's causes of action are barred by the litigation privilege, it is unnecessary to consider, and we express no opinion on Fred's alternative arguments that (1) the action is barred by claim preclusion (*res judicata*), (2) some causes of action are time-barred, and (3) the evidence submitted is inadmissible and, even if considered, does not sustain appellant's burden of showing a probability of prevailing on the merits.

opportunity to present his or her case and to protect himself or herself from any mistake or fraud of his or her adversary, but unreasonably neglected to do so.' " (*Home Ins., supra*, 96 Cal.App.4th at p. 27.) "Generally, the introduction of perjured testimony or false documents, or the concealment or suppression of material evidence is deemed intrinsic fraud." (*Ibid.*)

Beverly's complaint does not allege extrinsic fraud or mistake. She alleges no conduct by Fred that prevented her from defending the Note action or protecting her interests in the settlement. Indeed, Beverly was represented by counsel when the settlement was placed on the record. Accordingly, the court correctly determined that Beverly had not sustained her burden of establishing probable success on the merits.

DISPOSITION

The order granting the anti-SLAPP motion and the judgment are affirmed.
Respondent Fred Gledhill is entitled to costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.